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Federal Communications Commission

FCC 98-163

FCC MAIL ROOM

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
)
Treatment of the Guam Telephone)
Authority and Similarly Situated) CC Docket No. 97-134
Carriers as Incumbent Local Exchange)
Carriers under Section 251(h)(2))
of the Communications Act)

REPORT AND ORDER

Adopted: July 15, 1998

Released: July 20, 1998

By the Commission:

I. INTRODUCTION

1. Pursuant to our express rulemaking authority in section 251(h)(2) of the Communications Act of 1934, as amended (Act or Communications Act),¹ we adopt in this Report and Order the rule proposed by the Commission in *Guam Public Utilities Commission Petition for Declaratory Ruling concerning Sections 3(37) and 251(h) of the Communications Act, Treatment of the Guam Telephone Authority and Similarly Situated Carriers as Incumbent Local Exchange Carriers under Section 251(h)(2) of the Communications Act*.² In particular, we adopt a rule treating Guam Telephone Authority (GTA) as an incumbent local exchange carrier (LEC) for purposes of section 251. Adoption of this rule will ensure that the Territory of Guam (Guam) has the same opportunity as the rest of our Nation to benefit from the pro-competitive, market-opening effects of the Telecommunications Act of 1996. We

¹ 47 U.S.C. § 251(h)(2). Section 251(h)(2) was added to the Communications Act by the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, *codified at* 47 U.S.C. §§ 151 *et seq.* (1996 Act), which added many other provisions to the Communications Act, as well. *See, e.g.,* 47 U.S.C. §§ 251-261. All citations herein to the 1996 Act will be to the 1996 Act as codified in Title 47 of the United States Code.

² *Guam Public Utilities Commission Petition for Declaratory Ruling concerning Sections 3(37) and 251(h) of the Communications Act, Treatment of the Guam Telephone Authority and Similarly Situated Carriers as Incumbent Local Exchange Carriers under Section 251(h)(2) of the Communications Act*, Declaratory Ruling and Notice of Proposed Rulemaking, 12 FCC Red 6925 (1997) (*Guam Ruling/Notice*).

decline at this time, however, to adopt the same rule with respect to a class or category of LECs situated similarly to GTA, because the record does not identify any members of such class or category.

II. BACKGROUND

2. In the *Guam Ruling/Notice*, the Commission resolved a Petition for Declaratory Ruling filed by the Public Utilities Commission of the Territory of Guam (Guam Commission) regarding sections 251(h)(1) and 3(37) of the Communications Act. The Commission held that (i) GTA -- the only LEC throughout Guam -- is not an "incumbent local exchange carrier" within the meaning of section 251(h)(1),³ and (ii) GTA is a "rural telephone company" within the meaning of section 3(37).⁴

³ Section 251(h)(1) provides, in pertinent part: "[T]he term 'incumbent local exchange carrier' means, with respect to an area, the local exchange carrier that (A) on the date of enactment of the Telecommunications Act of 1996 [i.e., February 8, 1996], provided telephone exchange service in such area; and (B)(i) on such date of enactment, was deemed to be a member of the exchange carrier association pursuant to section 69.601(b) of the Commission's regulations (47 C.F.R. § 69.601(b)); or (ii) is a person or entity that, on or after such date of enactment, became a successor or assign of a member described in clause (i)." 47 U.S.C. § 251(h)(1). Section 69.601(b) of the Commission's rules provides that "[a]ll telephone companies that participate in the distribution of Carrier Common Line revenue requirement, pay long term support to association Common Line Tariff participants, or receive payments from the transitional support fund administered by the association shall be deemed to be members of the association." 47 C.F.R. § 69.601(b). The "association" to which section 251(h)(1) of the Communications Act and section 69.601(b) of the Commission's rules refer is the National Exchange Carrier Association, Inc. (NECA). NECA is an association of LECs established by the Commission in the early 1980s to administer the interstate access tariff and revenue distribution processes. See *MTS and WATS Market Structure*, CC Docket No. 78-72, Phase I, Third Report and Order, 93 FCC 2d 241, 333-34 (1983). The Commission concluded in the *Guam Ruling/Notice* that GTA is not an incumbent LEC within the meaning of section 251(h)(1) because GTA was not deemed to be a member of NECA as of the date of enactment of the 1996 Act (i.e., February 8, 1996), and it has not since become a successor or assign of a NECA member. *Guam Ruling/Notice*, 12 FCC Rcd at 6935-38, ¶¶ 14-20.

⁴ Section 3(37) defines a "rural telephone company" as "a local exchange carrier operating entity to the extent such entity (A) provides common carrier service to any local exchange carrier study area that does not include either (i) any incorporated place of 10,000 inhabitants or more, or any part thereof, based on the most recently available population statistics of the Bureau of the Census; or (ii) any territory, incorporated or unincorporated, included in an urbanized area, as defined by the Bureau of the Census as of August 10, 1993; (B) provides telephone exchange service, including exchange access, to fewer than 50,000 access lines; (C) provides telephone exchange service to any local exchange study area with fewer than 100,000 access lines; or (D) has less than 15 percent of its access lines in communities of more than 50,000 on the date of enactment of the Telecommunications Act of 1996." 47 U.S.C. § 153(37). The Commission concluded in the *Guam Ruling/Notice* that GTA is a rural telephone company within the meaning of section 3(37) because GTA is a local exchange carrier operating entity that provides telephone exchange service to a local exchange study area with fewer than 100,000 access lines. *Guam Ruling/Notice*, 12 FCC Rcd at 6938-39, ¶ 21.

3. One effect of the Commission's holdings in the *Guam Ruling/Notice* was that GTA could permanently avoid the interconnection, unbundling, resale, and other obligations imposed on incumbent LECs by section 251(c) of the Communications Act.⁵ Imposing these obligations on incumbent LECs, including rural telephone companies in appropriate circumstances, is one of the 1996 Act's primary methods of fostering the development of competition in the local exchange market.⁶ As a result, in the *Guam Ruling/Notice*, the Commission also issued a Notice of Proposed Rulemaking proposing that the Commission adopt, pursuant to section 251(h)(2) of the Communications Act,⁷ a rule providing for the treatment of GTA as an incumbent LEC for purposes of section 251.⁸ Under section 251(h)(2), the Commission "may, by rule, provide for the treatment of a local exchange carrier (or class or category thereof) as an incumbent local exchange carrier for purposes of [section 251]"⁹ if:

- (A) such carrier occupies a position in the market for telephone exchange service within an area that is comparable to the position occupied by a carrier described in paragraph (1);
- (B) such carrier has substantially replaced an incumbent local exchange carrier described in paragraph (1); and (C) such treatment is consistent with the public interest, convenience, and necessity and the purposes of this section.¹⁰

4. In the *Guam Ruling/Notice*, the Commission sought comment on the proposal therein to adopt a rule pursuant to section 251(h)(2) treating GTA as an incumbent LEC for purposes of section 251.¹¹ The Commission also sought comment regarding whether LECs situated similarly to GTA exist and, if so, whether the Commission should adopt the same rule with respect to such class or category of LECs.¹²

⁵ 47 U.S.C. § 251(c).

⁶ See, e.g., 47 U.S.C §§ 251(c), 251(f).

⁷ 47 U.S.C. § 251(h)(2).

⁸ *Guam Ruling/Notice*, 12 FCC Rcd at 6939-51, ¶¶ 1-13, 22-46, 51-52.

⁹ 47 U.S.C. § 251(h)(2).

¹⁰ *Id.*

¹¹ *Guam Ruling/Notice*, 12 FCC Rcd at 6939-51.

¹² *Id.*

III. DISCUSSION

5. Eight parties filed comments and/or reply comments in response to the *Guam Ruling/Notice*.¹³ All seven of the commenters that address the issue -- including GTA -- support our proposal to adopt a rule pursuant to section 251(h)(2) treating GTA as an incumbent LEC for purposes of section 251.¹⁴ In fact, GTA "requests that the Commission issue a ruling declaring that GTA should be treated as an [incumbent] LEC."¹⁵ GTA makes this request because GTA "is the sole provider of local exchange and exchange access services on Guam and, in that respect, is certainly comparable to incumbent LECs."¹⁶ Moreover, "GTA believes that the public interest, as well as the purposes of Section 251, would be served by providing for treatment of GTA as an incumbent LEC."¹⁷ Although "GTA believes that Section 251(h)(2) was intended to provide for circumstances in which a 'new entrant' replaces an incumbent LEC . . . , [GTA] does not disagree with the interpretation of Section 251(h)[(2)] proposed by the Commission in the NPRM, in so far as it would be applied to GTA."¹⁸ GTA takes this position because "the situation faced by GTA is virtually unique and clearly not contemplated by Congress when considering Section 251."¹⁹

6. In light of the foregoing, we hereby adopt in this Report and Order the rule proposed by the Commission in the *Guam Ruling/Notice*.²⁰ In particular, pursuant to our

¹³ Those eight are GTA, IT&E Overseas, Inc. (IT&E), MCI Telecommunications Corp. (MCI), AT&T Corp. (AT&T), GST Telecom, Inc. (GST), Guam Cable Telecommunications, Inc. (Guam Cable), the Commonwealth of the Northern Marianas, and jointly GTE Service Corporation and Micronesian Telecommunications Corp. (collectively GTE).

¹⁴ See, e.g., GTA Comments at 2-4 ("GTA supports the Commission's tentative conclusion that it should provide for the treatment of GTA as an incumbent LEC"); IT&E Comments at 2, 6; MCI Comments at 1; AT&T Comments at 1; GST Comments at 1; Guam Cable Comments at 1; Commonwealth of the Northern Marianas Comments at iii. GTE did not address that issue, focusing exclusively, instead, on whether Micronesian Telecommunications Corp. is situated similarly to GTA.

¹⁵ GTA Reply at 2.

¹⁶ GTA Comments at 3.

¹⁷ GTA Comments at 3.

¹⁸ GTA Comments at 3-4.

¹⁹ GTA Comments at 3.

²⁰ *Guam Ruling/Notice*, 12 FCC Red at 6940-48, ¶¶ 25-43.

express rulemaking authority in section 251(h)(2) of the Act, we adopt a rule treating GTA as an incumbent LEC for purposes of section 251.

7. Two commenters urge us to adopt a similar rule for all LECs situated similarly to GTA.²¹ They support, in particular, adoption of a general rule that treats as an incumbent LEC for purposes of section 251 any LEC that possesses market power in its local exchange service area and control over bottleneck local exchange facilities comparable to those possessed by statutorily-defined incumbent LECs.²²

8. Those same two commenters assert that Micronesian Telecommunications Corp. (MTC), the sole provider of local exchange service in the Commonwealth of the Northern Marianas (CNMI), is situated similarly to GTA within the context of section 251(h)(2).²³ They ask us, therefore, to adopt a rule treating MTC as an incumbent LEC for purposes of section 251.²⁴ In response, MTC and its parent company, GTE Service Corporation, concede that MTC, unlike GTA, *is* an incumbent LEC under section 251(h)(1), which they allege obviates the need for a rule treating MTC as an incumbent LEC under section 251(h)(2):

MTC is an incumbent LEC under the definition of an incumbent LEC set forth in Section 251(h)(1) of the 1996 Act. Neither MTC nor any other GTE-affiliated entity has disputed that MTC is an incumbent LEC. There is, therefore, no need for any further ruling of this fact.²⁵

²¹ IT&E Comments at 6; Commonwealth of the Northern Marianas Comments at 10-11.

²² *Id.*

²³ CNMI Comments at 3-10; IT&E Comments at 6-10. CNMI argues, in the alternative, that MTC is an incumbent LEC under section 251(h)(1). CNMI Comments at 8. To resolve that issue, CNMI filed with the Commission on July 14, 1997 a petition seeking a declaratory ruling that CNMI is an incumbent LEC within the meaning of section 251(h)(1). MTC filed an "opposition" on July 24, 1997 conceding that MTC is an incumbent LEC within the meaning of section 251(h)(1). Given MTC's concession in that proceeding and in this proceeding that it is an incumbent LEC within the meaning of section 251(h)(1), CNMI filed on August 11, 1997 a request to withdraw its petition for declaratory ruling. We hereby grant CNMI's request.

²⁴ CNMI Comments at 3-10; IT&E Comments at 6-10. IT&E also states that because CNMI has no regulatory entity with authority over telecommunications, we should undertake the task of applying section 251(f) of the Act, 47 U.S.C. § 251(f), to MTC. IT&E Comments at 6, 10-11. GTE responds that we lack jurisdiction to apply section 251(f). GTE Reply at 3. This issue regarding section 251(f)(1) exceeds the scope of this proceeding.

²⁵ GTE Reply at 2.

9. In light of the foregoing, we decline at this time to adopt a general rule under section 251(h)(2) treating as incumbent LECs all members of a class or category of LECs situated similarly to GTA. We so decline because the record does not indicate that any LEC situated similarly to GTA exists. As far as the record in this proceeding shows, MTC is not such a LEC for these purposes, because MTC (and its corporate parent), unlike GTA, concedes that it is an incumbent LEC under section 251(h)(1). We may revisit this issue if and when we become aware of the existence of a LEC or class or category of LECs similarly situated to GTA.

IV. FINAL REGULATORY FLEXIBILITY ANALYSIS

10. Pursuant to the Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA),²⁶ the Commission certified in the *Guam Ruling/Notice* that the proposed rule would not have a significant economic impact on a substantial number of small entities.²⁷ We received no comments regarding this certification.

11. In conformance with the RFA, as amended by the SBREFA, we certify that the rule adopted herein will not have a significant economic impact on a substantial number of small entities. Our rule treating GTA as an incumbent LEC pursuant to section 251(h)(2) will affect only GTA and the limited number of entities that seek to interconnect with GTA's network or resell GTA's services. Even if all of these entities can be classified as small entities, we do not believe that they constitute a "substantial number of small entities" for purposes of the Regulatory Flexibility Act.

12. The Commission's Office of Public Affairs, Reference Operations Division, shall send a copy of this Report and Order, including the foregoing certification and statement, to the Chief Counsel for Advocacy of the Small Business Administration.²⁸ The Secretary shall also include a copy of this Report and Order, including the foregoing certification and statement, in the report to Congress.²⁹ A copy of this certification also will be published in the Federal Register.

²⁶ 5 U.S.C. §§ 601, *et seq.* SBREFA was enacted as Subtitle II of the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996).

²⁷ *Guam Ruling/Notice*, 12 FCC Rcd at 6949, ¶ 45, citing 5 U.S.C. § 605(b).

²⁸ *See* 5 U.S.C. § 605(b).

²⁹ *See* 5 U.S.C. § 801(a)(1)(A).

V. ORDERING CLAUSES

13. ACCORDINGLY, IT IS ORDERED, pursuant to sections 1, 2, 4, 251, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154, 251, and 303(r), that the REPORT AND ORDER IS ADOPTED, and the requirements contained herein shall become effective 30 days after publication of a summary in the Federal Register.

14. IT IS FURTHER ORDERED that the Commission's Office of Public Affairs, Reference Operations Division, SHALL SEND a copy of this Report and Order, including the foregoing RFA certification and statement, to the Chief Counsel for Advocacy of the Small Business Administration, in accordance with section 605(b) of the RFA, as amended by the SBREFA, 5 U.S.C. § 605(b).


FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary